No. 889

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

O. HENRY BRIGGS, THOMAS J. DEEGAN, JR., WALTER W. FOSKETT, HENRY J. GUILD, ALLAN P. KIRBY, HERMAN R. NEFF, ROBERT R. YOUNG, CLINT W. MURCHISON, SID W. RICHARDSON, JOHN D. MURCHISON, CLINT W. MURCHISON, JR., MURCHISON BROTHERS and ALLEGHANY CORPORATION,

Petitioners,

v.

BRESWICK & CO. and MYRON NEISLOSS, as stockholders of Alleghany Corporation and on behalf of themselves and all other stockholders similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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BRESWICK & CO. and MYRON NELSLOSS, as stockholders of Alleghany Corporation and on behalf of themselves and all other stockholders similarly situated.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review an order of the United States Court of Appeals for the Second Circuit which dismissed petitioners' appeal from a District Court injunction on the ground that the order was "interlocutory." The Court of Appeals so acted in the face of Sections 1291 and 1292 of the Judicial Code, which permit appeals from both final and interlocutory injunctions.

Citations to Opinions Below

The opinion of the District Court, per Walsh, J., printed in Appendix B *infra*, p. 1, is reported in 135 F. Supp. 397. The memorandum decision of the Court of Appeals, printed in Appendix B, *infra*, p. 22, is unreported.

Jurisdiction

The order of the Circuit Court of Appeals was entered on January 23, 1956, Appendix B, *infra*, p. 23. The jurisdiction of this Court is invoked under Section 1254(1) of the Judicial Code. 28 U.S.C.A. Sec. 1254(1).

Question Presented

Whether an appeal will lie from an order of the District Court permanently enjoining defendants in a derivative stockholders suit from pleading as a defense a proposed judgment which may be rendered in a State Court action on the same derivative causes of action.

Statutes Involved

The statutory provisions involved are Sections 1291, 1292(1), 1738 and 2283 of the Judicial Code. They are printed in Appendix A, *infra*.

Statement

On February 14, 1955, respondents commenced the present stockholders' derivative suit in the United States District Court for the Southern District of New York against Alleghany Corporation and the individual petitioners, directors of the Corporation and their alleged co-conspirators. The complaint alleges waste of corporate assets, appropriation of corporate business opportunities, and a conspiracy to violate the Investment Company Act of 1940, 15 U.S.C.A. Sec. 80a-1, et seq. Jurisdiction of the District Court is invoked as to Counts 1-4 under Section 44 of the Investment Company Act, 15 U.S.C.A. Sec. 80a-43, and as to Counts 5-7 under Section 1332 of the Judicial Code,

28 U.S.C.A. Sec. 1332 (diversity of citizenship; amount in controversy over $3,000).

On October 27, 1955 the District Court issued an order "permanently enjoining" petitioners, defendants there, from pleading as a defense in this action any judgment of dismissal which might be rendered, pursuant to a proposed settlement, in an action pending in the Supreme Court of the State of New York. Appendix B, *infra*, p. 18. The complaint in the State Court action alleged, among others, all of the causes of action alleged in the present complaint. Petitioners appealed, and on respondents' motion the Court of Appeals for the Second Circuit summarily dismissed the appeal on the ground that the order was "interlocutory." Petitioners ask this Court to direct the Court of Appeals for the Second Circuit to hear their appeal from the injunction issued in the District Court.

To appreciate the significance of the extraordinary injunction issued by the District Court and the collision between the lower federal and state courts which will result if prompt review of the injunction is denied to petitioners, it is necessary to have a fuller picture of the facts.

The present action is one of over twenty derivative stockholder suits against the directors of Alleghany Corporation, including the present petitioners, growing out of the New York Central proxy fight of 1954. See Appendix B, *infra*, p. 2, et seq.

The first of the related derivative actions was brought in the District Court in April of 1954 by one Sadie Zenn, represented by Pomerantz, Levy & Haudek. At about the same time, similar actions were brought in the Supreme Court, New York County. The usual deluge of overlapping stockholders' actions ensued.

In May of 1954 all pending stockholders' actions in the District Court were consolidated ("the Federal Court Zenn action"). Shortly thereafter a similar consolidation order was entered in the State Court ("the State Court Zenn action"). In each court the firm of Pomerantz, Levy & Haudek was designated general counsel for the plaintiffs. They thereupon commenced depositions and other pre-trial proceedings.

Eight months after these earlier suits were consolidated the instant action (twenty-second in the series) was brought, the complaint copying some but not all of the causes of action in the Zenn complaints.

In April of 1955 a proposed settlement of all the interrelated derivative claims (subject to court approval) was agreed to between petitioners and Pomerantz, Levy & Haudek, the court-appointed general counsel for the stockholders in the consolidated Zenn actions. This proposed settlement, whereby petitioners agreed to pay over to the Corporation approximately one million dollars in cash and guarantees, was publicly announced on July 25, 1955 and was thereupon submitted for approval to the Supreme Court of the State of New York, County of New York. That Court, on August 18, 1955, appointed a referee to hear and report. Notice was sent to all shareholders of Alleghany Corporation on whose behalf the action was brought, and they were invited to make any objection which they might have to the proposed settlement at the hearings to be conducted before the referee. If the State Court should approve the settlement, a judgment dismissing the State Court Zenn action would result and the individual petitioners would be awarded a judicially approved release from all liability to the Corporation on all of the derivative causes of action pleaded in any of the complaints.

On August 11, 1955, however, respondents herein moved in the District Court for an order enjoining the State Court proceedings, alleging that the settlement had been collusively negotiated. The District Court observed that it had no power to stay the State Court proceedings and further found that there had been no collusion in the negotiation of the settlement. Appendix B, pp. 9, 13. The District Court went on, however, to introduce a startling innovation into the law of res judicata. It held that respondents had a right to participate in the settlement negotiations alongside general counsel; that the failure to include them in the negotiations was inequitable; and that respondents' rights would not be sufficiently protected by their opportunity (of which they have since availed themselves) to be heard in

the State Court proceedings to determine the fairness and equitability of the proposed settlement. The District Court accordingly granted alternative relief, neither requested nor suggested at the argument, permanently enjoining petitioners from pleading any judgment entered in the State Court settlement proceedings as a defense in the present action.

From the order of the District Court entered October 27, 1955, defendants-petitioners appealed to the Court of Appeals. Upon respondents' motion, this appeal was summarily dismissed. It is the summary dismissal of this appeal which petitioners ask this Court to review.

Reasons for Granting the Writ

I.

The Court of Appeals dismissed the appeal on the ground that the District Court's order was "interlocutory." But Section 1292(1) expressly permits appeals from "interlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions. . ." See Appendix A, *infra*, p. 1. "Thus by the plain words of § 129 [the predecessor of Section 1292(1)] the Circuit Court of Appeals was authorized to consider the appeals from the temporary injunction." *Deckert* v. *Independence Shares Corp.*, 311 U. S. 282, 287 (1940). By dismissing petitioners' appeal from an injunction on the ground that it was interlocutory, the Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this court's power of supervision." Rule 19(1)(b) of this Court.

II.

Respondents contended below that the District Court's order was not actually an injunction or that, at least, the injunction was "surplusage." The argument, whether or not it was accepted by the Court of Appeals, would make a mockery of Section 1292.

The District Court's order expressly recites that the Court was *"permanently enjoining"* petitioners from pleading res judicata. Appendix B, *infra*, p. 18. If petitioners should plead as res judicata in this action a judgment issued in the State Court settlement proceedings, they would surely be in contempt of court. There can be no more conclusive criterion to demonstrate the injunctive nature of the order of the District Court.

The District Court's order recites "the reasons for the issuance of this injunction" (Appendix B, *infra*, p. 19) and otherwise conforms to the provisions of Rule 65 of the Federal Rules of Civil Procedure regarding the form and scope of injunctions. The District Court's intention to issue an injunction could not have been more clearly expressed.

The District Court's opinion characterized its order as "the equivalent of staying the execution of a judgment in the hands of a plaintiff without invalidating the judgment." Appendix B, *infra*, p. 11. An injunction against the enforcement of a judgment which the court deems inequitable is a traditional exercise of the Chancellor's power. See *Marine Ins. Co.* v. *Hodgson*, 7 Cranch [U. S.] 331 (1813); *Cage* v. *Cassidy*, 23 How. [U. S.] 109 (1859); 4 *Pomeroy's Equity Jurisprudence*, Sec. 1364 (5th Ed., 1941). The authorities which the District Court cited in support of its power to issue the injunction are all cases of clearly equitable injunctions. E.g., *Wells Fargo & Co.* v. *Taylor*, 254 U. S. 175 (1920).

Respondents contended below that the District Court's order was not in substance an injunction because it amounted to nothing more than the striking of an affirmative defense or a statement of intention to strike a defense. But no defense had been pleaded; and if the District Court had merely volunteered an opinion on a hypothetical state of facts neither the parties nor other judges of the District Court would have been bound. The District Court obviously felt that to achieve its end it was necessary to do more than merely to express an opinion. For the District Court recognized that the judgment once pleaded would be res judicata. Appendix B, *infra*, pp. 10-11; *Stella* v. *Kaiser*,

218 F. 2d 64 (2d Cir. 1954); *Dana* v. *Morgan*, 232 Fed. 85 (2d Cir. 1916). Thus a motion to strike the affirmative defense of *res judicata* would have to be denied. But the District Court held that the procedural device it adopted was proper because "[t]he sole thrust of this determination is against the persons of the defendants . . ." (Appendix B, *infra*, p. 11) plainly a result which could be attained only by the issuance of an equitable injunction. Petitioners are thus barred, on pain of contempt, from pleading a defense of res judicata which, if pleaded, admittedly must prevail. There is no procedural device other than an injunction by which this result could be reached.

III.

The District Court's order is an injunction in substance as well as form for another reason which brings this case within an area of particular concern to this Court—the area of federal-state relations. The District Court, mindful of the prohibitions in Section 2283 of the Judicial Code (Appendix A, *infra* p. 2), disclaimed any intention to enjoin the prosecution of the settlement hearings in the State Court. But the order actually issued—an injunction against the use of the State Court judgment—has practically the same effect. For it deprives that Court of the power to issue a judgment and authorize a release which will effectively terminate the complex litigation of which the case at bar is a part. Avoidance of the burden of litigation is, of course, a principal purpose of the parties in settling. Any distinction between tying the State Court's hands and pulling its teeth is mere formalism. If the District Court's order stands, it will deprive the State Court of the power effectively to exercise its admitted jurisdiction to pass upon and approve the proposed settlement.

Nor is this all. In practical effect the District Court's order may well force petitioners to abandon the proposed settlement, since they can hardly be expected to pay $1,000,000 in the State Court for the privilege of continuing to litigate the identical causes of action in the District

Court. This is doubly true when petitioners know that, if successful on the trial in the Federal Court, they will be unable to recoup the consideration earlier paid in settlement. In both aspects of the matter the District Court's injunction intrudes upon the power of the State Court to pass upon and approve a settlement which it may hold to be highly beneficial to the Corporation.

(If, in passing upon the question of appealability, this Court should hold that the District Court's order is an injunction for the reason, among others, that it throttles the State Court, this Court's opinion will incidentally have given assistance to the Court below in determining the merits of the appeal. For Section 2283 of the Judicial Code, prohibits federal courts from enjoining state court proceedings. "Certainly the injunction issued by the district court nullified defendants' efforts in the state court almost as effectively as would the injunction against state court proceedings which is literally proscribed by 2283." Note, 65 Yale L. J. 543, 548.*)

Timing is of the essence here, for if prompt review is denied in the federal courts and the result is an abandonment of the State Court settlement, the damage to the harmonious working of the federal-state relationship will have been done, the District Court's order will become moot, and neither the Court of Appeals nor this Court will ever have an opportunity to pass upon the propriety of the novel injunction which has been issued. Thus the question of reviewability goes to the heart of the federal-state problem here.

IV.

In the Court below respondents invoked cases such as *Morgantown* v. *Royal Insurance Co.*, 337 U. S. 254 (1949),

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* An extensive Note on this case in 65 Yale L. J. 543 (1956) disapproves the action of the District Court, both as an improper invasion of the State Court's jurisdiction (at pp. 547-48) and as establishing an unsound rule regarding the proper procedure for settling stockholders' derivative actions (at p. 550). The Note comments in passing that the denial of review by the Court of Appeals is "at least dubious" (fn. 47, at p. 549).

and *Baltimore Contractors* v. *Bodinger*, 348 U. S. 176 (1955), which held that the District Court orders there involved were not injunctions and therefore not appealable. But there exists no analogy between those cases and that at bar.

The District Court orders involved in *Morgantown* and in *Bodinger* did not purport to be injunctions. In *Morgantown* the District Court had denied a demand for a jury trial. In *Bodinger* the District Court had denied a stay of the action pending arbitration. In neither case did the District Court enjoin a party from doing or omitting anything. In neither case was a party subjected to the threat of contempt penalties for disobeying the mandate of the District Court. In the present case the District Court did issue an injunction and did subject petitioners to contempt sanctions.

The problem in *Morgantown* and in *Bodinger* was whether a District Court order, non-injunctive in form, should nevertheless be treated as an injunction for appeal purposes. Somewhat similar orders had been so treated in *Enelow* v. *New York Life Ins. Co.*, 293 U. S. 379 (1935), in *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.*, 293 U. S. 449 (1935), and in *Ettelson* v. *Metropolitan Life Insurance Co.*, 317 U. S. 188 (1942). This Court had held in these earlier cases that the District Court's denial of a jury trial (in *Enelow* and in *Ettelson*) and the District Court's denial of a stay pending arbitration (in *Shanferoke*) were appealable because they granted relief which, prior to the merger of law and equity, could have been granted only by injunction. These historical reasons did not apply to the District Court orders in *Morgantown* and *Bodinger*; these orders were therefore treated as what they purported to be—namely, orders of the District Court regulating procedural matters in the cases before them.

The problems confronting this Court in the line of cases running from *Enelow* to *Bodinger* are not presented in the case at bar. We do not have here the question whether Section 1292(1) should, for historical reasons, be expanded beyond its literal terms. The District Court's order here is expressly denominated an injunction. It expressly re-

strains petitioners from engaging in specified conduct. It subjects petitioners to the jeopardy of a contempt punishment if they should disobey the Court's order.

It follows from what has been said above that, even if the decisions under discussion were in some fashion relevant to the case at bar, the District Court's order here would in any event be appealable. For, as shown in Points II and III, *supra*, that order is an exercise of a traditional equity power and it achieves a result not attainable except by injunction. It is therefore truly an equitable injunction not only in form but in substance as well.

V.

Respondents argued in the Court below that the appeal was premature because the State Court has not yet rendered a judgment approving the settlement. The argument is clearly unfounded. The fact that the State Court judgment has not yet been rendered might have been an additional ground for refusing to issue an injunction. But once the injunction was issued, the time to appeal therefrom was thirty days. Had petitioners waited beyond that period their appeal would certainly have been dismissed on the ground that it was not timely.

Respondents seem to suggest that petitioners should wait for the rendition of the State Court judgment, should then move to vacate the District Court's injunction and, upon denial of that motion, should then take their appeal. But under § 1292(1) an interlocutory injunction is immediately appealable regardless of the possibility that, at some future time, the District Court might vacate it. Moreover, the suggested motion to vacate the injunction would, in effect, be no more than an attempt to reargue the injunction which already in terms anticipates the issuance of the State Court judgment. It is well settled that the denial of such a motion is not appealable. *Marine Midland Trust Co.* v. *Eybro Corp.*, 58 F. 2d 165, 167-8 (C. A. 2, 1932).

VI.

The dismissal of petitioners' appeal by the Court of Appeals is not only in direct conflict with § 1292, it is equally contrary to § 1291, as construed in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949).

In *Cohen*, this Court held that *an interlocutory order* denying security for costs was appealable as *a final decision* under Section 1291 of the Judicial Code. Appendix A, *infra*, p. 1.* Justice Jackson, speaking for the Court, pointed out that:

> "This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." 337 U. S. 541, 546.

The order of the District Court in the present action falls within that group of decisions described by Justice Jackson as final decisions within the contemplation of Section 1291. It is too important to be denied review in that it will, if allowed to stand, vitiate the settlement designed to put and end to the complex litigation of which this case is a part; and it will completely nullify the long and exhaustive proceedings conducted by the New York Court to determine the fairness of that settlement.

Further, the propriety of that order, as in the *Cohen* case, may be determined wholly apart from the questions involved in the underlying causes of action. The questions

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* That the Court of Appeals gave inadequate consideration to the question of appealability is strongly suggested by the following. Along with the appeal from the injunction order here in question, petitioners brought a companion appeal from a second order of the District Court denying security for costs on four causes of action. The court below dismissed the appeal from the latter order on the ground that it, too, was "interlocutory," a result flatly contrary to the *Cohen* case, on which we relied below. (The security for costs order appears in the present record, although it is not the subject of the present petition.)

of the conduct of the negotiations leading to the settlement, of comity, and of full faith and credit which must be considered on appeal from the District Court's injunction are entirely independent of any issues raised by the derivative claims asserted in the complaint.

VII.

Finally, we respectfully submit that the nature and importance of the questions denied review by the Court of Appeals may properly be considered by this Court in passing upon the present petition for a writ of certiorari. Two questions of far-reaching importance to the working of our dual system of courts are involved and deserve brief mention here.

We have already seen that the question of appealability leads to a consideration of the impact of the District Court's order on the State Court settlement proceedings. It is plain from the opinion of the District Court that the unique injunction involved here was resorted to because it appeared that a direct injunction against the State Court settlement proceedings would be prohibited by Section 2283. Yet the effect of the injunction, as noted above, would be precisely to nullify those State Court proceedings, since defendants could not be expected to pay $1,000,000 to the corporation merely for the privilege of continuing litigation in another court. The District Court has simply done indirectly that which it could not do directly. Such attempts at circumvention have been sharply disapproved by this Court in its most recent decision construing Section 2283:

> "By that enactment [the 1948 amendment to Section 2283] Congress made clear beyond cavil that the prohibition is not to be whittled away by judicial improvisation." *Clothing Workers* v. *Richman Bros.*, 348 U. S. 511, 514 (1955).

The District Court's injunction not only whittles away the statutory prohibition, but chops it right out of the law.

The ground of the District Court's decision was that counsel for respondents, the stockholder plaintiffs in this

derivative action, had a right to join in the negotiation of the settlement now under consideration in the State Court but had not been invited to do so. The equity of this settlement with regard to all parties is, however, precisely the question now being considered by the State Court referee, who has had the benefit of sixteen weeks of the fullest kind of hearing, after notice to all stockholders of Alleghany. It is anomalous for the District Court to admit, on the one hand, the right of the State Court to hear and determine all of the issues relating to the propriety and adequacy of the settlement and yet to conclude, on the other hand, upon motion papers alone, that the pending State Court decision should be entitled to no weight in the present action. Not only is this bar to pleading an admittedly valid judgment an altogether unique development in the law of *res judicata*, but it necessarily rests on the premise that the State Court cannot be relied upon to protect the stockholders of Alleghany from an inequitable settlement. Precisely the contrary policy underlies Section 2283:

> "The prohibition of § 2283 is but continuing evidence of confidence in the state courts, reinforced by a desire to avoid direct conflicts between state and federal courts." *Clothing Workers* v. *Richman Bros.*, 348 U. S. 511, 518 (1955).

The District Court's injunction also offends against the requirement of full faith and credit, which is made applicable in the federal courts by Section 1738 of the Judicial Code, 28 U.S.C.A. Sec. 1738. That Section requires the District Court to give the State Court judgment the same effect it would have in the State Court itself. In explaining the grounds for the issuance of the injunction, the District Court did not suggest that the State Court judgment would be subject to attack in the State Court on the same grounds. Nor was there any reason to believe the State Court would entertain such an attack on its judgment, since the fairness of the negotiations by which the settlement was arrived at are admittedly among the issues before the State Court in the settlement proceedings. And if there were any doubt on this score, it has since been laid to rest

in this very litigation by a recent decision of the Appellate Division, First Department, of the Supreme Court of the State of New York. That Court has ruled that the exclusion of respondents from the settlement negotiations does not *per se* vitiate the settlement.* Note, 65 Yale L. J. 543, *fn. 43* at 549. It follows *a fortiori* that a State Court judgment would not be subject to attack in the New York courts on the ground on which the District Court would deny it effect in the Federal Court. Surely the requirement of full faith and credit cannot be evaded by the simple device of announcing in advance the intention to violate it.

The rapidly developing and quantitatively very important field of stockholders' derivative litigation has received little attention from this Court in recent years. It is virtually standard practice in this type of litigation for plaintiffs to prosecute their actions simultaneously in both state and federal courts, *Brendle* v. *Smith*, 46 F. Supp. 522 (S. D. N. Y. 1942); thus giving rise to a serious likelihood of recurrence of situations analogous to the present one. Granting of the present petition will open the door for appellate consideration of broad questions of federal-state relations in the increasingly important field of stockholder litigation. Denial of the present petition may be expected to result in the destruction of the settlement and the invasion of state court jurisdiction by a federal court. Finally the door will be opened to variants on the injunction device which can seriously undermine full faith and credit and Section 2283 and can create abhorrent races and conflicts between state and federal courts.

In summary, petitioners urge these points:

1. The Court below patently misapplied the clear language of Section 1292(1) of the Judicial Code, so

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* "We construe the order of reference, in entitling appellant to raise any question as to the fairness, reasonableness or adequacy of the settlement, to include the issue of the effect, if any, of the exclusion of persons from the negotiations for settlement. We assume that *unless there is an adverse effect on the settlement by reason of such exclusion, exclusion will not have been shown to be improper.*" *Zenn* v. *Anzalone*, 1 App. Div. 2d 662, 146 N. Y. S. 2d 286, 287 (1st Dept. 1955) (emphasis added).

"as to call for an exercise of this Court's power of supervision."

2. The Court below acted in conflict with applicable decisions of this Court construing Sections 1292(1) and 1291 and may have applied decisions under Section 1292(1) which do not bear on the case at bar.
3. The action of the Court below, in deferring review of the District Court's order, left the way open for an improper invasion of the jurisdiction of the State Court which cannot be remedied by later appellate review.
4. The action of the Court below is likely to render moot substantial and novel questions regarding the proper functioning of the dual system of federal and state courts.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated: April 21, 1956.

Respectfully submitted,

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APPENDIX A

Statutes Involved

28 U. S. C. A. Sec. 1291. Final decisions of district courts.

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. 62 Stat. 929 (1948), as amended 65 Stat. 726 (1951).

28 U. S. C. A. Sec. 1292. Interlocutory decisions.

The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court; * * *. 62 Stat. 929 (1948), as amended 65 Stat. 726 (1951).

28 U. S. C. A. Sec. 1738. State and Territorial statutes and judicial proceedings; full faith and credit.

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists,

together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. 62 Stat. 947 (1948).

28 U. S. C. A. Sec. 2283. Stay of State court proceedings.

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments. 62 Stat. 968 (1948).

APPENDIX B

Opinions and Orders Below

(1) Opinion of the District Court

BRESWICK & Co. and MYRON NEISLOSS, as stockholders of Alleghany Corporation and on behalf of themselves and all other stockholders similarly situated,

Plaintiffs,

v.

O. HENRY BRIGGS, THOMAS J. DEEGAN, JR., WALTER W. FOSKETT, HENRY J. GUILD, ALLAN P. KIRBY, HERMAN R. NEFF, ANDREW VAN PELT, ROBERT R. YOUNG, CLINT W. MURCHISON, SID W. RICHARDSON, JOHN D. MURCHISON, CLINT W. MURCHISON, JR., MURCHISON BROTHERS and ALLEGHANY CORPORATION,

Defendants.

UNITED STATES DISTRICT COURT
S. D. NEW YORK.
Sept. 28, 1955.

Rosston, Hort & Brussel, New York City (George Brussel, Jr., Eugene G. King, Joseph B. Hyman, New York City, of counsel), for plaintiffs.

Lord, Day & Lord, New York City (Thomas F. Daly, Saul L. Sherman, New York City, of counsel), for defendants Alleghany Corporation, O. Henry Briggs, Thomas J. Deegan, Jr., Walter W. Foskett, Henry J. Guild, Allan P. Kirby and Herman R. Neff.

Satterlee, Warfield & Stephens, New York City (William E. Stockhausen, New York City, of counsel), for defendants John D. Murchison, Clint W. Murchison, Jr., Murchison Brothers and Sid W. Richardson.

Peter George Martin, New York City, for defendant Alleghany Corporation in Zenn, et al. v. Anzalone, et al.

Appendix B-2

Pomerantz, Levy & Haudek, New York City (Abraham Pomerantz, New York City, of counsel), for plaintiffs in Zenn, et al. v. Anzalone, et al.

WALSH, *District Judge.*

Plaintiffs in this derivative action in the right of Alleghany Corporation, move for summary judgment as to five of the seven counts alleged in their complaint and for a stay of proceedings in the New York State Supreme Court to approve a settlement of substantially the same causes of action, negotiated by defendants and counsel for other groups of stockholders.

Defendants move to consolidate this action with the other derivative actions already consolidated in this court and for the designation of the general counsel in those actions as general counsel for the consolidated action.

Summary Judgment

Alleghany is a holding company devoted to investments in other enterprises. Defendant Young is Chairman of its Board of Directors. Defendant Kirby is its President. Several other defendants are its officers and directors. Defendant Murchison and his sons and defendant Richardson hold no office in Alleghany but as private investors have dealt with it in several of the transactions included in the complaint.

Plaintiffs' claims grow out of three principal transactions:

(1) The New York Central Railroad proxy fight of 1954;

(2) A proposed new issue of Alleghany preferred stock;

(3) Alleghany's relinquishment of control of Investors Diversified Services, Inc. by exchanging its voting stock for non-voting stock held by the Murchisons.

Plaintiffs allege that these acts and omissions violated the Investment Company Act, and that they are in derogation of the common-law obligation of corporate directors and those acting in concert with them.

Common to all counts is the question of whether Alleghany is an investment company subject to the Investment Company Act or excluded from its operation by Section 3(c) (9) because it is a "person authorized to control a carrier" subject to regulation under Section 5(3) of the Interstate Commerce Act. The defendants during the period in question have admittedly acted upon an assumption that Alleghany was not subject to the Investment Company Act and they urge as a defense that this is in fact correct and further that in any event they in good faith believed that it was. As a matter of law they were wrong and it will simplify the discussion of the motions if these defenses are disposed of first.

Admittedly Alleghany was not subject to the Investment Company Act from 1945 to January 19, 1954. With the authorization of the Interstate Commerce Commission it held control of the Chesapeake & Ohio Railroad. The Securities and Exchange Commission had recognized its status and terminated its registration as an investment company.

On January 19, 1954, however, Alleghany sold its interest in the C. & O., the only carrier of which it had control. From then until May 26, 1954, it admittedly had control of no carrier. Since May 26, 1954, defendants claim Alleghany in fact controls the New York Central but concededly there has been no order of the I.C.C. authorizing this control if in fact it exists. An order of the I.C.C. which obliquely attempted to validate Alleghany's claim to exemption from the Investment Company Act was temporarily stayed by a three-judge court in Breswick & Co. v. United States, D.C., 134 F.Supp. 132, Per Dimock, D. J., and is presently *sub judice*. Although further action by the I.C.C. may in the future establish Alleghany as a person authorized to control a carrier pursuant to Subdivisions (2) and (3) of Section 5 of the Interstate Commerce Act, this cannot dispose

of the claim that at the time of the acts and omissions alleged, Alleghany was subject to the Investment Company Act.

Defendants claim they relied on the continuing effect of the I.C.C. and S.E.C. orders even though they, of course, knew that the sale of the C. & O. terminated the only fact upon which these orders were based. That these orders had in law no effect after January 19, 1954, the date of the sale of the C. & O., was more fully explained in Breswick & Co. v. United States, supra. It now seems to me that, as a matter of law, their lack of legal effect was so obvious that professed reliance upon them in good faith is patently frivolous.

The I.C.C. order determining Alleghany's status upon the basis of its control of C. & O. contained the usual language of a regulatory order that it continues until changed by subsequent order. Even though Alleghany's acceptance of such an order might estop it from noncompliance, there is no basis for concluding that it could shield Alleghany from complying with the Investment Company Act. There was nothing actually inconsistent between Alleghany's submitting required reports to the I.C.C. and complying with the Investment Company Act too. And if in fact its compliance with the Investment Company Act did produce any conflict this would have led to the prompt termination of the I.C.C. order.

The S.E.C. order did not even by its terms purport to exempt Alleghany from compliance with the Investment Company Act. This order provided:

> "It is hereby declared that Alleghany Corporation has ceased to be and is not now an investment company within the meaning of the Investment Company Act of 1940; and
>
> "It is ordered that the registration of Alleghany Corporation under the Investment Company Act of 1940 shall forthwith cease to be in effect, provided, however, that if in the future Alleghany Corporation ceases to be subject to regulation under the Interstate Com-

merce Act as set forth in such Findings and Opinion, this order may be revoked, suspended or modified after appropriate notice and opportunity for hearing."

It is no more than a finding that on the date of promulgation Alleghany was not an investment company and an order that its registration should "cease to be in effect". The proviso merely reserved the S.E.C.'s right to change the order by proceeding brought on its own motion. It did not absolve Alleghany in perpetuity from its obligation of voluntary compliance with the law as circumstances changed.

Accordingly the application for summary judgment is considered with recognition that during the period in question Alleghany was not conforming to the Investment Company Act and it had no basis in good faith for failing to do so.

The New York Central Proxy Fight

(First, Second and Sixth Counts)

During the months before the annual meeting of New York Central on May 26, 1954, while defendants Young and Kirby prepared for their successful proxy fight to elect a Board of Directors for the Central, Alleghany Corporation took certain action which was instrumental to this ultimate success. The dispute centers on plaintiffs' contention that these acts were pursuant to a conspiracy to use the corporate facilities of Alleghany for the personal gain of Young, Kirby, the other defendant directors, and their alleged affiliates, the Murchison group and Richardson. The undisputed facts are:

(a) The market price of New York Central stock increased substantially between December 1, 1953 and June 14, 1954. Young and Kirby bought 200,000 shares of Central stock in December, 1953, but prior to June 14, 1954 they only acquired 11,400 shares for Alleghany.

(b) Alleghany loaned Murchison and Richardson $7.5 million without security to assist them in purchasing for themselves 800,000 shares of Central stock from Alleghany's former subsidiary, the C. & O.

(c) Alleghany committed itself to purchase from Murchison and Richardson 300,000[1] of these shares at 25 (equal to or above the then market) at the option of Murchison and Richardson.

(d) Alleghany expended $1,369,775 to finance the successful proxy fight.

(e) Murchison and Richardson voted their stock in support of the nominees supported by Young and Kirby.

(f) These nominees were elected and they in turn elected Young, Chairman of the Board of the Central.

Plaintiffs contend that these facts show that Young and Kirby appropriated for their personal benefit, business opportunities available to Alleghany and that they caused Alleghany to spend and lend its money in support of concerted action by Young, Kirby, the Murchisons and Richardson to take over the management of the Central for their personal benefit, Alleghany having so little stock that it stood to profit little from the victory. Plaintiffs also contend that the Murchisons and Richardson act with the defendant directors in concert to control Alleghany and that therefore the loan to Murchison and Richardson was a loan to affiliated persons and to persons in control, in violation of Sections 17(a)(3) and 21(b) of the Investment Company Act. Further they claim that the money advanced by Alleghany for the expenses of the proxy fight was a similarly prohibited loan.

In addition to the defense of reliance upon the orders of the I.C.C. and S.E.C., the answering affidavit of the defendant Young denies that Murchison and Richardson were

[1] The "Alleghany-Young-Kirby" proxy statement to stockholders of New York Central states 400,000. The complaint states 300,000.

acting in concert with Kirby and himself, or any of the defendant directors at the time of the loan to them of the money for the purchase of the New York Central stock. He denies that he or any of the defendant directors took advantage of a business opportunity available to Alleghany, claiming that whereas the investment in New York Central stock was a suitable speculation for Kirby and himself personally, it would have been unduly speculative for Alleghany. He further claims that if Alleghany had attempted to purchase more New York Central stock, it would have run up the market price of that stock. He does not explain why under these circumstances it was prudent for Alleghany to commit itself to purchase 300,000 shares of New York Central stock at the option of Murchison and Richardson. Similarly, he does not explain why the fear of raising the price of the stock which kept Alleghany out of the market did not also prevent Kirby and himself from acquiring their own large personal holdings. Nor does he dispel the possibility of a conflict in this regard between his personal venture and that of Alleghany.

The convincing or unconvincing quality of this affidavit is not a proper matter for consideration. It is enough that issues of fact are raised. Although many of the alleged transactions are not susceptible to dispute, issues of fact as to the reasons for their occurrence and the relationship between the individual defendants preclude summary judgment at this time. It is not enough that plaintiffs might establish a prima facie case by record transactions. Defendants are entitled to a full opportunity to present their defense and they cannot be compelled to meet these issues by affidavits. Subin v. Goldsmith, 2 Cir., 224 F.2d 753, Per Frank J.

The New Issue of Preferred Stock

(Third Count)

It is undisputed that Alleghany is in the process of issuing a new class of preferred stock to replace one of the classes already issued and that Alleghany is doing this

without compliance with the Investment Company Act. It was this transaction which prompted the three-judge determination in Breswick & Co. v. United States, supra, reviewing an order of the I.C.C. authorizing this issue. The issue is already enjoined in that proceeding and, unless the validity of the I.C.C. order is re-established on final hearing, it will not go forward until it is approved by the appropriate administrative agency. This protection seems adequate, at least for the present, and there is therefore no need for an additional injunction issued in this proceeding. Judgment for damages resulting from noncompliance with the Investment Company Act should await final administrative action.

It is also undisputed that shortly before the plan for the issuance of the new stock was announced, defendant Young more than doubled his personal holdings of the old stock to be refunded, increasing them from 5,179 shares to 11,087. Whether the defendant Young appropriated a corporate opportunity again presents an issue of fact, which may not be properly determined on a motion for summary judgment.

Relinquishment of Control of Investors Diversified Services, Inc.

(Fourth Count)

It is undisputed that Alleghany has exchanged voting stock by which it controlled I.D.S. for nonvoting stock formerly held by the Murchisons. Plaintiffs claim that this was part of an agreement to get the support of Murchison and Richardson in the New York Central proxy fight. Defendant Young vehemently denies this and the Secretary of the Corporation, in his affidavit, states that the exchange was negotiated because Alleghany wished to be freed from its control of I.D.S. so that it could more easily pledge its stock as collateral. Obviously the true nature of this transaction presents an issue of fact for the trial.

Accordingly plaintiffs' motion for summary judgment must be denied.

Appendix B-9

Stay of Settlement

Four days after the three-judge court in Breswick & Co. v. United States, supra, granted a preliminary injunction and expressed conclusions of law substantially helpful to plaintiffs' claim that Alleghany was subject to the Investment Company Act, defendants and counsel for another group of stockholders announced a stipulation of settlement to terminate the present action as well as all other derivative actions based upon the same alleged misconduct of the directors. This stipulation has been submitted to the New York State Supreme Court for its approval. Plaintiffs here seek a stay of the State proceedings upon the ground that the agreement of settlement was collusive.

The affidavits submitted do not establish collusion. The fact that the lawyer who represented Alleghany Corporation in executing the stipulation was closely associated with the law firm which represented the directors does not establish collusion. It is not to be expected that the lawyer representing the corporation will be unfriendly with the directors thereof or their counsel. The real adversary party expected to protect the interests of the stockholders is the lawyer who represents the stockholder group and although he did lend himself to a sharp maneuver by the defendants, there is no suggestion that he dealt with them at less than arms-length.

Nevertheless, the conduct of defendants was inequitable, and they should not be permitted to profit by it. There was no proper reason for excluding plaintiffs' counsel from the negotiations. Substantially all of the other derivative actions had been consolidated and the lawyer with whom the defendants negotiated the settlement had been designated as general counsel. In this sense, all of the other litigating stockholders, were represented at the bargaining table, whereas the present plaintiffs, who perhaps had been the most vigorous and most successful in the litigation, were left out.

Defendants have indulged in confused overgeneralizations from the concept that the corporation rather than the active plaintiffs is the "real party in interest". As between

defendants and plaintiffs, defendants owe the same legal duties they owe any other adversary in the courts, regardless of the derivative nature of the action. True, the "real party in interest" in all of the pending derivative actions is the corporation itself but the real parties *in litigation* are those stockholders who are undertaking the trouble and expense of establishing the rights of the corporation.[2] Although their individual interests must always be subordinate to the corporation and the stockholders as a whole, this does not in any way lessen their right to procedural decencies from their adversaries, the defendants. Defendants in a derivative action therefore have no greater right to a judgment based upon settlement negotiated with some one other than the active plaintiffs than in any other action. Their attempt to use such a judgment is just as inequitable and merits the same repression by this court unless it can be shown that the supervening interest of the *corporation*, as distinguished from the defendants, somehow requires that the defendants be permitted to exploit such a judgment. Here no such showing was made[3]. By restraining defendants there is no injury to the corporation. If the State Court finds the settlement adequate it may be approved and any payment thereunder allowed in reduction of any recovery obtained by plaintiffs here.

This is in no way a departure from the now settled rule that a judgment after trial of one derivative action is *res*

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[2] If the conclusion expressed in this paragraph were wrong and the corporation were the real party in litigation as well as the real party in interest, it would then be most improper for it to be represented by counsel not in a position to deal aggressively against the directors, and the facts in this regard would require more searching exploration than the consideration they received on the argument of this motion.

[3] Cf. Pergament v. Frazer, D.C.E.D. Mich., 93 F.Supp. 13, 20, affirmed Masterson v. Pergament, 6 Cir., 203 F.2d 315, in which settlement was approved in spite of exclusion of counsel for some active plaintiffs, the court being satisfied that these plaintiffs were motivated not by an interest in the corporation but by hostility to it. Here it is merely said that the actual plaintiffs are engaged in a proxy fight with the directors. This in no way suggests a lack of honest interest in the corporation nor does it justify the directors in trying to settle the case without them.

judicata as to all others based upon the same issues. Dana v. Morgan, 2 Cir., 232 F. 85. Nor from the extension of this rule to judgments based upon stipulations of settlement. Stella v. Kaiser, 2 Cir., 218 F.2d 64, 65-67; Gerith Realty Corp. v. Normandie Nat. Securities Corp., 154 Misc. 615, 276 N.Y.S. 655, affirmed 241 App.Div. 717, 269 N.Y.S. 1007, affirmed 266 N.Y. 525, 195 N.E. 183; Milvy v. Sperry Corp., Sup., 36 N.Y.S.2d 881. Cf. Winkelman v. General Motors Corporation, D.C., 39 F.Supp. 826. The sole thrust of this determination is against the persons of the defendants; they are not in equity entitled to utilize a judgment based upon a settlement negotiated behind the backs of the active plaintiffs here. This is the equivalent of staying the execution of a judgment in the hands of a plaintiff without invalidating the judgment. See Western Union Telegraph Co. v. Tompa, 2 Cir., 51 F.2d 1032, 1034. Undoubtedly the realistic value of the judgment to the defendants will be greatly reduced but this is a risk they must have knowingly taken when they left the plaintiffs out of the settlement negotiations.

The defendants say that it is impossible to negotiate with all counsel when there are so many actions. The fact is that they need only have negotiated with two, the counsel for the present plaintiffs and general counsel for the others. If for any reason the number with whom they negotiated was to be further reduced to one, the appropriate method by which to accomplish this was by a further motion for consolidation so that the general counsel with whom to negotiate could be designated by the court and not selected by the defendants.[4]

The fact that some of the actions were in the State Court and some in this court does not present an insuperable problem. If both courts concluded that the same lawyer should be designated as general counsel in both sets of

[4] Actually a motion for this purpose was made before the settlement was announced but it was adjourned by consent and is still pending. Plaintiffs, however, did not know of the settlement negotiations until they were announced.

proceedings, defendants could have proceeded to negotiate with him alone. If either court concluded that different lawyers should be designated as general counsel in the two sets of proceedings, this would amount to a finding that there was good reason why the defendants should conduct their negotiations with more than one person. It may be that in other derivative suits the number of actions or the distance between the courts would make it impracticable to insist upon consolidation and the appointment of a general counsel as a condition for the exclusion of active parties from settlement negotiations. Cf. Pergament v. Frazer, D.C., E.D.Mich., 93 F.Supp. 13. But that is not the case here. It is highly important that the defendants not have the power to choose among the counsel representing the stockholders the one with whom they will deal Neither should they have power to halt the progress of a case which is moving rapidly and constructively in one court by compelling the concentration of attention upon a settlement submitted in another where that settlement is not negotiated with the active parties to that case. In this regard I follow the view of Judge Allen in Masterson v. Pergament, supra. Nothing in Stella v. Kaiser, supra, 218 F.2d 64, is inconsistent with this view. The issues of fraud and inequity as to the conduct of the settlement negotiations in that case were concluded in another court.

It is said that any question of inequity may be raised in the State Court and urged as a basis for disapproving the proposed settlement. This is true but it would compel plaintiffs who have been proceeding successfully here to halt and either seek to intervene in the State action or appear with the lesser stature of a protesting stockholder. In either case they would be required to subject themselves to the order of the State Court to be heard on the very limited issue tendered by the defendant—whether this particular settlement agreement should be approved. They would then be precluded by the State judgment. Stella v. Kaiser, 2 Cir., 218 F.2d 64, 65. Actually plaintiffs have no opportunity to participate in the negotiation of the settle-

ment now before the State Court and there is no way in which that opportunity can be given to them without throwing the entire agreement open to renegotiation. Their ability to urge the Supreme Court not to approve the settlement is no substitute for the right to be represented in its negotiation. In any event, the primary responsibility for the fair treatment of the litigants before this court is here. Western Union Telegraph Co. v. Tompa, supra, 51 F.2d 1032, 1034.

To enjoin the defendants from proceeding in the State Court would perhaps be within the general statutory prohibition against enjoining proceedings in a State Court, 28 U.S.C.A. § 2283. Such an injunction is not necessary. Plaintiffs can be protected by enjoining defendants from using as a defense in this action, any judgment which may be entered upon a stipulation of settlement not negotiated with the present plaintiffs or their representatives. In this way there is no interference in the State Court proceedings nor is any doubt cast upon its judgment, but these defendants are precluded from taking inequitable advantage of their unconscionable conduct in attempting to bind their adversaries by a settlement to which they were not parties.

In Wells Fargo & Co. v. Taylor, 1920, 254 U.S. 175, 41 S.Ct. 93, 98, 65 L.Ed. 205, the Supreme Court upheld the power of a District Court to enjoin the inequitable use of a judgment obtained by a plaintiff in disregard of a contract. The court in explaining the existence of this power found it as an incident of the well-recognized power to enjoin the execution of a judgment based upon fraud, accident or mistake. Yet the judgment enjoined from execution in the Wells Fargo case was not based upon fraud, accident or mistake. Its execution was enjoined simply because plaintiff in obtaining it had acted in disregard of his contractual obligation to a third person. He was an employee of the Wells Fargo Express Company. He had by his contract of employment expressly stipulated that neither the railroad nor the express company should be

liable for any injury due to a railroad accident. Nevertheless, after being so injured he successfully recovered a State Court judgment against the railroad company and it in turn commenced an action for indemnity under its contract with the express company. Finding that the express company could not recoup from the employee because he was not financially responsible, the District Court enjoined the employee from executing his State Court judgment against the railroad. The concluding sentence of the opinion of the Supreme Court is:

> "In these circumstances, that company is entitled in equity and good conscience, as is shown by the cases before cited, to a decree holding him to his agreement and depriving him of his present inequitable advantage, and to that end enjoining him from collecting the judgment."

Although in the Wells Fargo case the express company had unsuccessfully attempted to intervene in the State action against the railroad, this distinction has not been made in cases following that decision. It has been held that persons may protect themselves against the inequitable use of a judgment by application to either the Federal Court or in the court in which the judgment was entered. See, Western Union Telegraph Co. v. Tompa, supra, 2 Cir., 51 F.2d 1032, 1034. See also National Surety Co. v. State Bank, 8 Cir., 120 F. 593, 61 L.R.A. 394; Joseph Reid Gas Engine Co. v. Exchange Nat. Bank, D.C.W.D.La., 281 F. 847; Seay v. Hawkins, 8 Cir., 17 F.2d 710, 713.

It may also be thought that at this time an injunction is premature because there is no certainty that the State Court will approve the stipulation of settlement. We do know, however, that defendants intend to use the judgment as a defense here if they can; they have so informed the court. This is adequate basis for action now. It is also desirable that the parties know the disposition of this court to prevent any unfair surprise. In Western Union Tele-

graph Co. v. Tompa, supra, 2 Cir., 51 F.2d 1032, 1035, the Court of Appeals for this Circuit said:

> "* * * The fact that a federal court of equity is prevented, by the limitation imposed by the above statute, from granting complete relief, should not be taken as an excuse for not doing presently what will eventually have to be done if the threatened injury to the plaintiff should become more imminent in the event that the defendant does recover a judgment against the railroad. Indeed, the difference between the threat now of unlawful injury from such a judgment and what it will be if the defendant prevails in her state suit is only one of degree. It is too plain for discussion that her real purpose and intent is not only to obtain a judgment against the railroad, but to collect it. We cannot prevent her doing all she can to obtain one, but, since it already appears that it will inevitably be against equity and good conscience to permit her to collect it, we will now grant such relief as we think the statute permits by enjoining her from doing anything to enforce any judgment she may obtain and leave her otherwise free to proceed as she may be advised."

Accordingly, defendants are enjoined from interposing in this action any defense based upon a judgment entered pursuant to an agreement not negotiated with plaintiffs or their counsel.

Consolidation

Defendants move for consolidation of the present action with the other derivative actions pending in this court.

Several derivative actions were begun at about the same time in 1954 in both the State Courts and this court. The plaintiffs in the present action did not commence a State Court proceeding and they were one of the last groups of stockholders to sue. They are not parties to any action pending in the State Court or any of the other derivative actions pending in this court. They were the first and only

litigants to develop the contention that during the period in question Alleghany was subject to the Investment Company Act.[5]

Plaintiffs in the other derivative actions and the defendants ask that the lawyer designated as general counsel in those actions be designated as general counsel for the proposed consolidated action. He is a lawyer of extensive experience in this type of litigation but in the argument of these motions he showed less than a full comprehension of the proceedings which plaintiffs have conducted. Indeed, he characterized their efforts in this action as "abortive" on the shallow basis that their original application for a preliminary injunction had been denied notwithstanding that this application gave rise to plaintiffs' so far successful prosecution of Breswick & Co. v. United States, supra, and the establishment of important propositions of law. To place this action under his control seems hardly fair to plaintiffs, particularly after he has already committed himself to a settlement based in part upon an incomplete evaluation of their efforts.

The application for consolidation is denied without prejudice to its renewal after the conclusion of the proceedings in the State Court for the approval of the proposed stipulation of settlement. At that time the desirability of consolidation and the terms and conditions under which it should be effected may be better determined.

Settle order on notice.

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[5] In Schepis v. Briggs, et al., an action started in the New York State Supreme Court, Kings County, it was alleged that defendants acted in violation of the Investment Company Act but the claim differed in other respects from that of the present plaintiffs and no steps were taken to develop that claim.

Appendix B-17

(2) Order of the District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRESWICK & CO. and MYRON NEISLOSS, as stockholders of Alleghany Corporation and on behalf of themselves and all other stockholders similarly situated, *Plaintiffs,* *against* O. HENRY BRIGGS, THOMAS J. DEEGAN, JR., WALTER W. FOSKETT, HENRY J. GUILD, ALLAN P. KIRBY, HERMAN R. NEFF, ANDREW VAN PELT, ROBERT R. YOUNG, CLINT W. MURCHISON, SID W. RICHARDSON, JOHN D. MURCHISON, CLINT W. MURCHISON, JR., MURCHISON BROTHERS and ALLEGHANY CORPORATION, *Defendants.*	CIVIL ACTION No. 98-371

At New York, New York, in said District on October 27, 1955.

Plaintiffs having moved this court (1) for an order pursuant to Rule 56 of the Federal Rules of Civil Procedure awarding them summary judgment on the first, second, third, fourth and sixth counts of the amended complaint; (2) for orders consolidating with this action Civil Action No. 100-364 (Jeannette Annenberg, plaintiff, against Chesapeake Industries, Inc., et al., defendants) and Civil Action No. 101-155 (Charles Monheit, plaintiff, against J. J. Anzalone, et al., defendants), both of which actions are pending in this court; and (3) for an order staying all proceedings in the consolidated action instituted in the Supreme Court of the State of New York, County of New York, by Sadie Zenn, et al., plaintiffs, against J. J. Anzalone, et al., defendants (New York County Clerk's Index No. 7244-1954); and

Defendants having moved this court (1) for an order staying the disposition of plaintiffs' motion for summary judgment; (2) for orders consolidating with Civil Action No. 92-205 (Sadie Zenn, et al., plaintiffs, against J. J. Anzalone, et al., defendants), the above entitled action and Civil Action No. 100-364 (Jeannette Annenberg, plaintiff, against Chesapeake Industries, Inc., et al., defendants), and Civil Action No. 101-155 (Charles Monheit, plaintiff, against J. J. Anzalone, et al., defendants), and Civil Action No. 101-256 (Rupert T. Brown, plaintiff, against O. Henry Briggs, et al., defendants), all of which actions are now pending in this court; (3) for an order directing that any deposition taken by plaintiffs in this action be taken simultaneously with depositions taken by plaintiffs in Civil Action No. 92-205; and (4) for an order vacating or modifying plaintiffs' notice of depositions dated May 19, 1955, and served herein on May 19, 1955, to take the depositions of Robert R. Young and Allan P. Kirby; it is

ORDERED, that said motions be and they hereby are disposed of as follows:

1. Plaintiffs' motion for an order staying all proceedings in the consolidated action instituted in the Supreme Court of the State of New York, County of New York, by Sadie Zenn, et al., plaintiffs, against J. J. Anzalone, et al., defendants, (New York County Clerk's Index No. 7244-1954), be and it hereby is granted to the extent of permanently enjoining the defendants herein, and each of them, and their attorneys, from:

(A) Interposing in this action any defense based upon any judgment entered in any action other than this action pursuant to any agreement not negotiated with the plaintiffs or their attorneys, and

(B) Interposing in this action any defense based upon any judgment entered in the consolidated action instituted in the Supreme Court of the State of New York, County of New York, by Sadie Zenn, et al., as plaintiffs, against J. J. Anzalone, et al., defendants,

(New York County Clerk's Index No. 7244-1954) entered pursuant to or deriving from any agreement of settlement of any causes of action set forth in the complaint in said action not negotiated with plaintiffs herein or their attorneys, except that, if the Supreme Court of the State of New York in said action pending before it adjudge that the proposed settlement be approved, any payment by or for the account of the defendants herein made in pursuance of such judgment shall be allowed in reduction of any recovery obtained by plaintiffs herein and shall be credited against any execution issued upon any judgment entered upon such recovery.

2. The provisions of decretal paragraph 1 of this order shall be binding upon the defendants herein, their officers, agents, servants, employees, and attorneys, and upon all other persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise.

3. The reasons for the issuance of this injunction are those stated in the opinion of the Court dated and filed September 28, 1955.

4. Any party hereto on five days notice to any other party may apply at the foot of this order for any further relief as may be just and necessary to effectuate decretal paragraphs 1 and 2 of this order.

5. Plaintiffs' motions for orders consolidating with this action the actions instituted in this Court by Charles Monheit against J. J. Anzalone, et al. (Civil Action No. 101-155) and by Jeannette Annenberg against Chesapeake Industries, Inc., et al. (Civil Action No. 100-364) are denied without prejudice.

6. Defendants' motions for orders consolidating this action and the actions instituted in this court by said

Monheit, (Civil Action No. 101-155), said Annenberg, (Civil Action No. 100-364), and said Brown (Civil Action No. 101-256) with the action instituted in this court by Sadie Zenn, et al., against J. J. Anzalone, et al., (Civil Action No. 92-205) are denied without prejudice.

7. Plaintiffs' motion for an order awarding them summary judgment on the first, second, third, fourth and sixth counts of the amended complaint, is denied.

8. Defendants' motion for an order staying the disposition of plaintiffs' motion for summary judgment is denied.

9. Defendants' motion for an order directing that any depositions taken by plaintiffs in this action be taken simultaneously with depositions taken by the plaintiffs in Civil Action No. 92-205 is denied without prejudice; the temporary restraint contained in the order to show cause dated May 17, 1955, made by the Hon. Archie O. Dawson, U.S.D.J., is vacated; and the taking of the depositions of the witnesses Florence McCormick and David W. Wallace, Secretary of defendant Alleghany Corporation, pursuant to notice of taking of deposition dated May 11, 1955, filed herein on May 12, 1955, shall proceed before Benjamin Goodglass, notary public, at the office of Rosston, Hort & Brussel, attorneys for plaintiffs, at No. 141 Broadway, New York City, except that no deposition shall be scheduled for any day on which hearings had previously been scheduled in the consolidated action in said case of Zenn v. Anzalone or so long as hearings are held on consecutive days in said case.

10. Defendants' motion for an order vacating or modifying plaintiffs' notice of taking of depositions dated May 19, 1955, filed herein on May 20, 1955, to take the deposition of defendants Robert R. Young and Allan P. Kirby, is denied without prejudice, and the taking of said depositions shall proceed before Benjamin Goodglass, notary public,

at the office of Rosston, Hort & Brussel, attorneys for plaintiffs, No. 141 Broadway, New York City, subject to the same exception as paragraph 9.

LAWRENCE E. WALSH
U.S.D.J.

Appendix B-22

(3) Memorandum Decision of the Court of Appeals

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
UNITED STATES COURTHOUSE
Foley Square
New York 7

January 23, 1956

Re: *Breswick & Co. et ano.* v. *O. H. Briggs, et al.*

Dear Sirs:

This Court has today disposed of the motion in the above entitled case thusly:

"Defendants' motions and application for a stay are denied; plaintiffs' cross-motions for dismissal of appeals from orders of Judges Walsh and McGohey as interlocutory are granted.

C.E.C.
J.N.F.
J.E.L.
U.S.C.JJ."

Very truly yours,

A. DANIEL FUSARO, Clerk

cc: LORD, DAY & LORD, ESQS.
25 Broadway
New York 4, N. Y.

ROSSTON, HORT & BRUSSEL, ESQS.
141 Broadway
New York, New York

SATTERLEE, WARFIELD & STEPHENS, ESQS.
460 Park Avenue
New York, New York

(4) Order of the Court of Appeals

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-third day of January, one thousand nine hundred and fifty-six.

Present:

HON. CHARLES E. CLARK,
Chief Judge,

HON. JEROME N. FRANK,

HON. J. EDWARD LUMBARD,
Circuit Judges.

BRESWICK & Co., et ano.,
Plaintiffs-Appellees,

v.

O. HENRY BRIGGS, et al
Defendants-Appellants

A motion having been made herein by counsel for the appellants, O. Henry Briggs, Thomas J. Deegan, Jr., Walter W. Foskett, Henry J. Guild, Allan P. Kirby, Herman R. Neff, Robert R. Young and Alleghany Corporation for a stay pending appeal and a cross motion having been made herein by counsel for the appellees to dismiss the appeals from the orders of October 27, 1955 and December 19, 1955, respectively, for lack of jurisdiction,

Upon consideration thereof, it is

Ordered that the motion for a stay pending appeal be and it hereby is denied.

Further ordered that the motion to dismiss the aforesaid appeals be and it hereby is granted, and the said appeals be and they hereby are dismissed.

/s/ A. Daniel Fusaro
Clerk

No. 889

FILED
MAY 18 1956
HAROLD B. WILLEY, CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

O. HENRY BRIGGS, THOMAS J. DEEGAN, JR., WALTER W. FOSKETT, HENRY J. GUILD, ALLAN P. KIRBY, HERMAN R. NEFF, ROBERT R. YOUNG, CLINT W. MURCHISON, SID W. RICHARDSON, JOHN D. MURCHISON, CLINT W. MURCHISON, JR., MURCHISON BROTHERS and ALLEGHANY CORPORATION,

Petitioners,

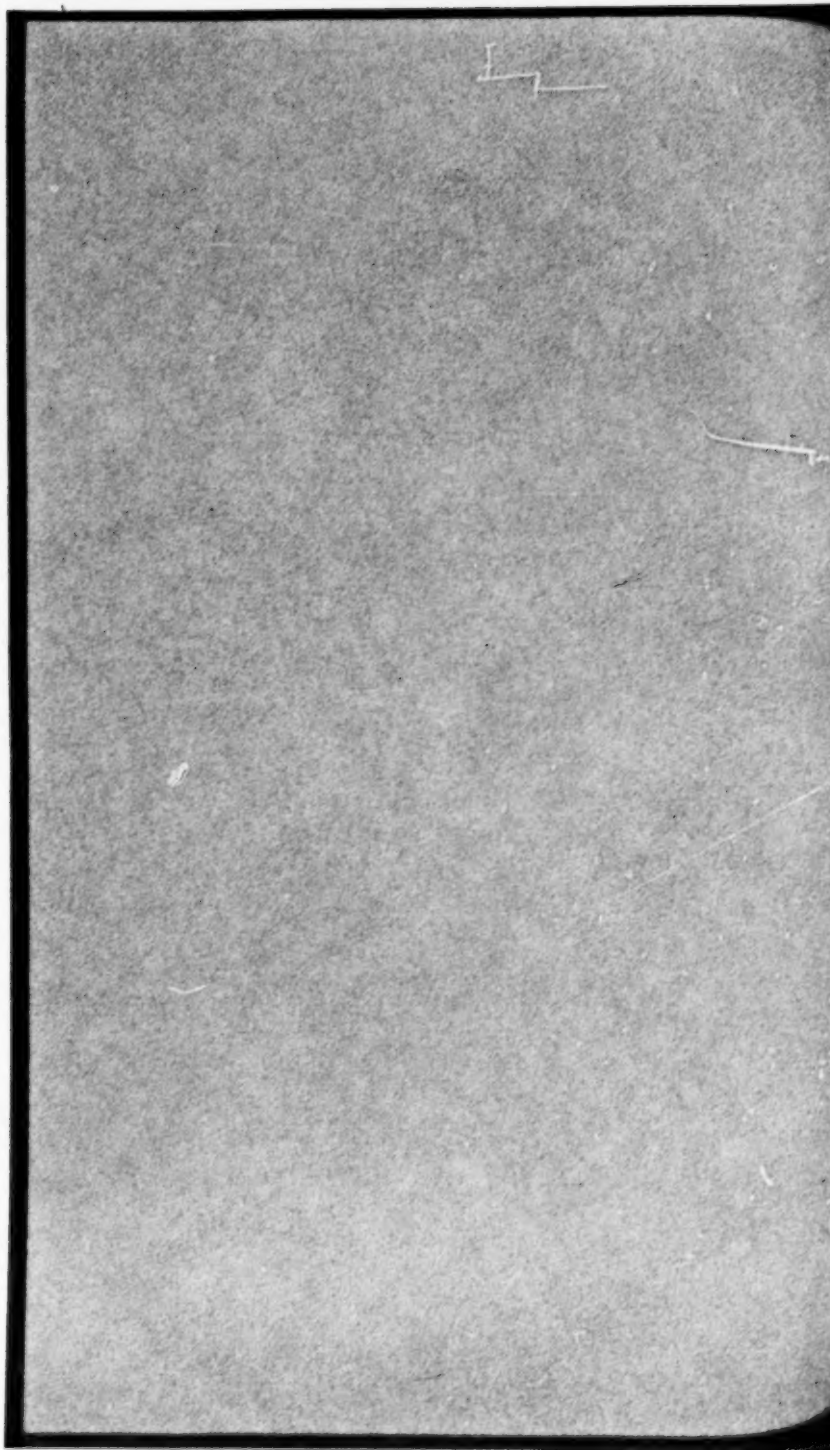
v.

BRESWICK & CO. and MYRON NEISLOSS, as stockholders of Alleghany Corporation and on behalf of themselves and all other stockholders similarly situated,

Respondents.

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GEORGE BRUSSEL, JR.,
141 Broadway,
New York 6, N. Y.,
Attorney for Respondents.



No. 889

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

O. HENRY BRIGGS, *et al.*,
Petitioners,

v.

BRESWICK & CO., *et ano.*,
Respondents.

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Question Presented

Is an interlocutory order appealable as an injunction, when it merely rules, prior to trial, against defendants interposing as an answer the possible defense of *res judicata* as a result of a State Court judgment which does not exist and may never be rendered?

Argument

The District Court's order is injunctive only in form, and is no more than an interlocutory ruling on the law to be applied to one defense, when and if it is ever interposed.

The District Court held that when and if defendants in a stockholders' derivative action obtain a state court judgment approving a settlement claimed to be worth

$1,000,000.00, that sum would be deducted from any judgment rendered in the District Court, and the State Court judgment would not be pleadable as *res judicata,* because of defendants "unconscionable conduct in attempting to bind their adversaries by a settlement to which they were not parties". The settlement was negotiated with a lawyer for the State Court stockholder-plaintiffs whom the District Court found (Petition, App. B-16) had "shown less than a full comprehension" of the proceedings conducted by respondents notwithstanding that respondents "perhaps had been the most vigorous and most successful in the litigation" (*Id.*, B-9).

Since the State Court had not approved the settlement when the Court of Appeals dismissed, and since no approval has been obtained up to the present time, and since the settlement may be disapproved by the State Court, the defendants may never be affected by this ruling. Also, if the case be tried in the District Court, its judgment may be for less than $1,000,000. Thus, the District Court ruling, which the Court of Appeals held is presently not appealable, is contingent upon events which may never occur. If they do happen, the interlocutory order will be merged in an appealable final judgment and defendants' right to appeal therefrom can be fully preserved. The Court of Appeals thus was correct in holding that such an order was a non-appealable interlocutory ruling involving a prospective defense that may never be pleaded and not an injunction within 28 U. S. Code 1292(1).

Although the order below speaks of "permanently enjoining" appellants, this is mere surplusage. "The statute looks to the substantial effect of the order made." *Ettleson* v. *Metropolitan Insurance Co.,* 317 U. S. 188.

In the District Court's words: "*If* (italics supplied) the State Court finds the settlement equitable it may be approved and any payment thereunder allowed in reduc-

tion of any recovery obtained by the plaintiffs" (Petition, App. B-10).

Such an order is obviously conditional, prospective and in substance not injunctive within the meaning of Section 1292(1).

It should be noted that no stay of any other action was ordered by the District Court. In fact the State Court proceeding continues without restraint. Compare *Shanferoke Co.* v. *Westchester Co.*, 239 U. S. 449, with *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U. S. 176. In the former, the denial of a stay of a non-equitable action was held to be appealable as a denial of an injunction. In the latter, the denial of a stay of a suit in equity was held not to be appealable as an injunction.

The case below was in equity and the "injunction" was no more than the normal exercise of the power inherent in any judge to control the course of proceedings in his own court. As was suggested by a member of the Court of Appeals on the argument below, it amounts to nothing more than a pretrial order.

If a decision be "only a decision as to how to try the case" (it) "therefore is not an interlocutory order in the nature of an injunction". *Baltimore Contractors* v. *Bodinger*, 348 U. S. 176, 99 L. Ed. 171, 176, citing *Morgantown* v. *Royal Insurance Co.*, 337 U. S. 254.

To reject the interposition of but one defense out of many available to petitioners is obviously merely to make "only a decision as to how to try the case". Denying a jury trial in *Morgantown* was surely as final as denying here the possible future defense of *res judicata*. But, this Court held in *Morgantown*, an order denying a jury trial is not an interlocutory order in the nature of an injunction.

No injunction is needed to accomplish the purpose of the District Court. The ruling here appealed from could have been made irrespective of an injunction. The order

appealed from presents only a fragment of the controversy between the parties and to sustain its appealability would violate the rule laid down in *Morgantown.*

"Piecemeal appeals have never been encouraged" (*Morgantown, supra,* at p. 258).

"So long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal" (*Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U. S. 541, 546.

The order held appealable in the *Cohen* case "did not make any step toward final disposition of the merits of the case and will not be merged in final judgment" (p. 546). Since the ruling here is a ruling on a prospective pleading, it will be merged in the final judgment. Also, unlike *Cohen,* there will be no irreparable loss of appeal rights since the appeal on the ruling challenged here can still be taken on appeal from the final judgment. In addition, the District Court may reject the defense of *res judicata* on other grounds than those now presented, such as fraud or collusion. There is in fact now pending a motion to enjoin the State Court proceedings because of fraud and collusion.

It is true that if appellants are entitled to a reversal of the District Court's ruling, they *may* have to stand a trial which, but for that ruling, would have been unnecessary. But such a reason advanced in support of appealability was specifically rejected in *Bodinger.* (See dissent based on that very point, 99 L. Ed., at pp. 177-8.)

CONCLUSION

The petition herein should be denied.

GEORGE BRUSSEL, JR.,
Attorney for Respondents.

May 18, 1956.